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In the Supreme Court of the United States

OCTOBER TERM, 1993

INTERNATIONAL UNION OF ELECTRONIC ELECTRICAL, TECHNICAL, SALARIED AND MACHINE WORKERS, AFL-CIO, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether 19 U.S.C. 1677a(d)(1)(C) permits the International Trade Administration (ITA) to rely on a company's business records to determine whether a tax has been "added to or included in" a product's home market price.

2. Whether the ITA's practice (which it has now abandoned) of allowing a company to cap its antidumping duties by posting a bond was inconsistent with 19 U.S.C. 1673f(a).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3-34) is reported at 6 F.3d 1511. The opinions of the Court of International Trade (CIT) are reported at 712 F. Supp. 931 (Pet. App. 45-68), 760 F. Supp. 200 (Pet. App. 69-133), and 794 F. Supp. 389 (Pet. App. 35-44).

JURISDICTION

The judgment of the court of appeals was entered on September 30, 1993. A petition for rehearing was denied on November 18, 1993. Pet. App. 1-2. The petition for a writ of certiorari was filed on February

16, 1994. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. To determine whether a company has engaged in dumping, the International Trade Administration (ITA) compares the foreign market value of a product to the United States price. 19 U.S.C. 1675(a). Before making that comparison, the ITA is required to increase the U.S. price by the amount of any taxes forgiven on exported products "to the extent that such taxes are added to or included in the price of such or similar merchandise when sold in the country of exportation." 19 U.S.C. 1677a(d)(1)(C).

In 1984, the ITA began an investigation into whether three Korean companies—Daewoo, Samsung, and Goldstar—had been dumping color televisions in the United States. Pet. App. 6-7. The ITA ultimately concluded that all three companies had engaged in dumping. *Ibid.* In calculating the difference between the foreign price and the U.S. price of the televisions, the ITA added to the U.S. price the full amount of the Korean taxes forgiven upon export. *Id.* at 9. The ITA based that determination on the fact that the business records of the three companies showed that the taxes had all been added to Korean market prices. *Id.* at 9-10. The ITA refers to that method of calculating the extent to which a tax has been "added to or included in" the home market price as an accounting approach. *Id.* at 10.

The Court of International Trade (CIT) rejected the ITA's accounting approach. It concluded that the "added to or included in the price" language in 19 U.S.C. 1677a(d)(1)(C) required the ITA undertake an

econometric (or other suitable) analysis to determine what portion of the tax was passed through to consumers and what portion was absorbed by the companies. It remanded to the ITA to make that calculation. Pet. App. 10-12.[1]

On remand, the ITA used an econometric analysis and determined that the taxes were entirely passed through to consumers. On appeal, the CIT concluded, however, that the ITA had used an unsound method of analysis. It therefore remanded for further proceedings once again. Pet. App. 13. This time the ITA used a different econometric analysis and concluded that the tax incidence on consumers varied from 33%-63%. *Ibid.* Based on those smaller tax increments, the ITA calculated dumping differentials that were substantially greater than those that resulted from use of the accounting method. *Id.* at 7, 13-14. The CIT approved those margins. *Id.* at 14.

The court of appeals reversed. Pet. App. 3-34. Applying this Court's decision in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984), the court of appeals held that 19 U.S.C. 1677a(d)(1)(C) permits the ITA to use its accounting approach to rely on a company's business

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[1] The Federal Circuit explained the theory of econometric analysis with the following example: Suppose the government imposes a $50 tax on a previously untaxed item that cost $100. If the company charges $150 for the item after the tax is imposed, there is a 100% pass through to consumers. If, however, the company raises its price to $125, then only 50% of the tax is borne by consumers, while 50% is absorbed by the seller. Pet. App. 11 n.4. In practice, it is enormously difficult, if not impossible, to determine what portion of a tax is passed through to consumers.

records to determine whether a tax has been "added to or included in" the home market price. Pet. App. 15-17. The court rejected petitioners' argument that the language of the statute compels the ITA to determine what portion of the tax is passed through to consumers, explaining that "[t]he statute does not speak to tax incidence, shifting burdens, or pass-through." *Id.* at 17.

In approving the ITA's interpretation, the court of appeals also took into account the practical difficulties with an econometric approach. Pet. App. 21. The court explained that an econometric analysis "requires numerous subsidiary market inquiries, entails a high degree of speculation based on one economic theory rather than another, and produces results of dubious soundness." *Ibid.* "The delay and expense in making such an analysis," the court added, "would restrict the number of investigations which could be handled and interfere with ITA's statutorily mandated duty to 'complete the [antidumping] determination within rigid time limits.'" *Id.* at 21-22 [brackets in original].

2. After the ITA makes a preliminary determination that a company has engaged in dumping, the company must post a cash deposit or a bond to cover the estimated duties pending a final determination on the amounts owed. 19 U.S.C. 1673b(d). Under 19 U.S.C. 1673f(a), a cash deposit has the effect of capping a company's liability at the amount deposited. By regulation, the ITA also permitted companies to cap their liability by posting a bond. Pet. App. 28.

Consistent with that regulation, the Korean companies in this case posted bonds to cover their estimated duties. Pet. App. 28. The CIT, however,

concluded that the regulation was inconsistent with 19 U.S.C. 1673f(a). Pet. App. 28-29. The CIT therefore concluded that the Korean companies were liable for the amounts determined in the final dumping order—amounts significantly greater than the estimated duties for which they posted bonds. *Id.* at 29.

The court of appeals reversed that determination as well. It held that the ITA's resolution of the cap issue was also entitled to deference under *Chevron*. Pet. App. 29-31. The court of appeals reasoned that while 19 U.S.C. 1673f(a) allows companies to cap their liability with cash deposits, that statute "does not speak to whether estimated duty bonds cap antidumping duties." Pet. App. 30. The court concluded that "[g]iven this silence, as well as the statute's authorization to *file* bonds to cover estimated duties," the ITA's "allow-ance of a duty ceiling for bonds [was not] contrary to the statute." *Id.* at 30-31. The court of appeals also noted that the ITA had recently changed its policy to require cash deposits for capping purposes, and the court approved the ITA's decision to make that change prospective only. *Id.* at 29 n.17.

ARGUMENT

1. Petitioners contend that the court of appeals "bypassed" step one of the *Chevron* analysis and never addressed whether the language of the tax offset provision is open to more than one interpretation. Pet. 13. Petitioners further contend that the "added to or included in the price" language in 19 U.S.C. 1677a(d)(1)(C) is unambiguous and requires the ITA to calculate what portion of a tax has been passed through to consumers. *Ibid.*

Applying *Chevron*, however, the court of appeals properly concluded that the ITA's accounting approach is consistent with the statutory language relied upon by petitioners. Pet. App. 16-17. As the court of appeals noted, the ITA will make a tax adjustment only "if an exporter's records show that a tax was either a separate 'add on' to the domestic price or, although not separately stated, was, in fact, included in the price." *Ibid.* That approach is consistent with the statutory directive to make a tax adjustment only when the tax is "added to or included in" the home market price. 19 U.S.C. 1677a(d)(1)(C). Moreover, as the court of appeals concluded, nothing in the language of the statute compels the ITA to calculate the economic effect of a tax on consumers. Pet. App. 17. As the court of appeals explained, "[t]he statute does not speak to tax incidence, shifting burdens, or pass-through." *Ibid.*

Petitioners next contend that the court of appeals erred in relying on the difficulties of an econometric analysis in approving the ITA's approach. Pet. 13-15. The court of appeals, however, properly took those practical considerations into account. As the court of appeals explained, econometric analysis involves a "high degree of speculation" and is likely to produce "results of dubious soundness." Pet. App. 21. In addition, the time and money required to complete such studies would limit the number of investigations the ITA could conduct and interfere with its ability to act in a timely manner. *Id.* at 21-22. Given those consequences, it is highly unlikely that Congress would have required the ITA to adopt an econometric approach.

Petitioners assert that the ITA can determine the actual incidence of a tax on consumers without undertaking an econometric analysis. Pet. 15 & n.2. In particular, petitioners claim that the ITA could measure tax incidence through a "simple" rebate allocation methodology. *Ibid.* For several reasons, however, that approach is unsatisfactory. First, manufacturers do not offer rebates on every home market sale. Second, even if a rebate is given, there is no reason to assume that any part of the rebate represents tax. Finally, while petitioners suggest that there are "any number of accounting techniques available to determine how much of [a rebate] might be considered tax not included in the price" (Pet. 15 n.2), they fail to identify any such technique. Thus, if the ITA is required to determine the actual effect of a tax on consumers, it will be forced to undertake costly, time consuming, and unreliable econometric studies. The court of appeals properly refused to read the tax offset provision to impose that obligation.[2]

2. Petitioners also challenge the ITA's previous practice of permitting a company to cap its liability by posting a bond (Pet. 17-18). As the court of appeals observed, although 19 U.S.C. 1677f(a) limits a company's liability to its cash deposit, that provision does not address whether the ITA has discretion to treat

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[2] As petitioners note (Pet. 7), the ITA initially read the statute to require an econometric analysis. But "[a]n initial agency interpretation is not instantly carved in stone" and "the agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis." *Chevron*, 467 U.S. at 863-864. In this case, after further review, the ITA justifiably concluded that the statute does not require an econometric approach.

bonds in the same manner. Pet. App. 30. The ITA has now changed its policy to preclude a company from limiting its liability by posting a bond. Consequently, the question raised by petitioners has no continuing importance.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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